MOTION FILED

MAR 2 2 2000

No. 99-1403

In the Supreme Court of the United States

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA and BOARD OF TRUSTEES OF CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA,

Petitioners,

vs.

RAYMOND STONE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS BRIEF and AMICUS BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Training Institute for the Sheet Metal and Air Conditioning Industry ("ITI") hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the ITI in this case arises from the fact that it operates a Scholarship Loan Agreement ("SLA") Program, whereby individuals receive training at no cost, provided the individual agrees to repay the cost of the training in the event the individual goes to work for an employer that does not contribute to the Joint Apprenticeship and Training Committees. The ITI has been construed by the Department of Labor to be an employee welfare plan within the meaning of ERISA Section 3(1). SLA Programs, identical to the one operated by the ITI, have been found enforceable by other courts. The Ninth Circuit's decision leaves these agreements unenforceable in that Circuit and leaves the ITI with no remedy and jeopardizes the ability of the ITI to operate its apprenticeship and training program.

The ITI supports the Petitioners' petition in this case because the Ninth Circuit's holding extends well beyond the program operated by the Petitioner and has created a conflict among the Circuits.

Dated: March 22, 2000

Respectfully submitted,

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THE INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the ITI in this case arises from the fact that it operates a Scholarship Loan Agreement ("SLA") Program, whereby individuals receive training at no cost, provided the individual agrees to repay the cost of the training in the event the individual goes to work for an employer that does not contribute to the Joint Apprenticeship and Training Committees. The ITI has been construed by the Department of Labor to be an employee welfare plan within the meaning of ERISA Section 3(1). SLA Programs, identical to the one operated by the ITI have been found enforceable by other courts. The Ninth Circuit's decision leaves these agreements unenforceable in that Circuit and leaves the ITI with no remedy and jeopardizes the ability of the ITI to operate its apprenticeship and training program.

SUMMARY OF ARGUMENT

If the Ninth Circuit's decision in *Cement Masons v. Stone* is allowed to stand, SLA Programs such as that operated by the ITI would be unable to operate. These programs serve an important purpose by providing free training to hundreds of thousands of apprentices and journey persons in the construction trades. The Ninth Circuit's decision in *Cement Masons v. Stone* has created a divide among the Circuits over the enforceability of Scholarship Loan Agreement obligations. The proper analysis is that set forth by the Seventh Circuit in *Milwaukee Area Joint Apprenticeship Training Committee for the Electrical Industry v. Howell*, 67 F.3d 1333 (7th Cir. 1995).

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[1] Counsel for a party did not author any part of this brief. No entity other than the *amicus curiae*, its members or its counsel made any monetary contribution to the preparation or submission of the brief.

ARGUMENT

The International Training Institute for the Sheet Metal and Air Conditioning Industry ("ITI") is a jointly administered multiemployer apprenticeship and training fund. It was established by and is sponsored by the Sheet Metal Workers International Association and the Sheet Metal and Air Conditioning Contractors' National Association. It is an apprenticeship and training fund within the meaning of Section 3(1) of ERISA.[2] It is affiliated with over 100 local and regional joint apprenticeship and training committees throughout the country in the sheet metal industry. The ITI develops training material and provides courses of instruction to train instructors in the sheet metal industry. Together the ITI and the local Joint Apprenticeship and Training Committees ("JATC") have trained hundreds of thousands of apprentices and journey persons in the sheet metal industry in the last 28 years.

In 1984, the ITI (under its predecessor name of the National Training Fund for the Sheet Metal and Air Conditioning Industry) developed a program known as the Scholarship Loan Agreement Program.

The Scholarship Loan Agreement ("SLA") Program is also used by other sectors of the building trades and the SLA Program is one of the reasons why the apprenticeship and training programs in the building and construction industry are so successful and are able to provide skilled workers in the construction industry, at no cost to the individual being training.

The heart of this program is the Scholarship Loan Agreement between the ITI, the local JATC and the soon to be

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[2] The Department of Labor in an advisory opinion letter dated January 8, 1979, concluded that the International Training Institute was an employee welfare benefit plan within the meaning of ERISA Section 3(1).

indentured apprentice, whereby the individual is trained at no cost, provided the individual is willing to make a commitment to the industry that trained him or her by continuing to work under collective bargaining agreements that provide for contributions to the local JATCs and to the ITI. If the individual leaves the industry, there is no further obligation pursuant to the agreement. However, if the individual, upon completion of the training, goes to work for an employer that does not have an obligation to contribute to the ITI and the local JATC, the individual is obligated to pay for the cost of the training which in turn allows other individuals to be trained. The enforceability of these SLA's has been upheld by other courts in other circuits. See *Milwaukee Area Joint Apprenticeship Training Committee for the Electrical Industry v. Howell*, 67 F.3d 1333 (7th Cir. 1995). *Howell* involved a scholarship loan agreement document identical to the one used by the ITI.

Not only have the courts upheld the enforceability of these agreements, they have presented persuasive rationale for the existence of these repayment obligations. In *National Training Fund v. Maddux*, 751 F. Supp. 120 (S.D. Tex. 1990), the court found that the ITI's SLA Program was in the interest of public policy when it stated:

> These national training Funds are not charities, giving away their resources. The Funds train a limited number of people who will directly benefit the members . . . . The reimbursement prevents freeloading by neighboring competitors. Because they do not pay for the program, they can pay workers slightly more than the members can at the same total cost. The public is best served by enforcement of a reasonable reimbursement provision.
>
> Without a check on freeloading by non-participating companies, the Funds would not have trained [the apprentice]. The work-or-pay provision is

> what allowed [him] to acquire his new skill. The reimbursement makes a non-participating employer equal to a participating employer if he pays the reimbursement, either in the form of a lump sum or a higher salary to get the trained worker.

Maddux, 751 F. Supp. at 121-122.

If the Ninth Circuit's decision in *Cement Masons v. Stone* is allowed to stand, the ITI and all other local, regional and national joint apprenticeship and training funds in the Ninth Circuit will be unable to enforce their SLA obligations. They will not be able to bring suit in federal court in the Ninth Circuit, nor will they be able to bring suit in state court. The SLA Program is one of the terms of the ITI's and local JATC's plan of benefits and therefore ERISA would preempt any and all state laws and actions relating to this program.

Cement Masons v. Stone is in direct conflict with *Milwaukee Area Joint Apprenticeship Training Committee for the Electrical Industry v. Howell*, 67 F.3d 1333 (7th Cir. 1995).

Cement Masons v. Stone is also in direct conflict with *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999). This case, like *Cement Masons*, was a subrogation case. Although *Health Cost* was decided four months before *Cement Masons*, the reasoning of the line of cases that *Cement Masons*, was based upon was specifically rejected by the 7th Circuit when it stated:

> So Health Cost is indeed seeking a constructive trust and while the Ninth Circuit appears to believe that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust, *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261(9th Cir. 1997), it has given no reason for this belief and there is no basis for it either in ERISA or in the

> principles of equity . . . . Alternative characterizations of Health Costs' claims (alternative to both restitution and constructive trust)–as seeking to impose an equitable lien on the escrow account or seeking a mandatory injunction directing Washington to sign over her claim to the money–are also permissible, moreover, and they reinforce our conclusion that Health Cost's claim is securely equitable and so within the jurisdiction conferred on the district court by ERISA.

Washington, 187 F.3d at 711.

Cement Masons v. Stone is in direct conflict with *Health Cost Controls of Illinois Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999).

CONCLUSION

For the reasons set forth herein, petition for writ of certiorari should be granted.

Dated: March 22, 2000 Respectfully submitted,

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